

EXHIBIT 1

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 05-44481

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In the Matter of:

DELPHI CORPORATION ET AL,

Debtor.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

March 21, 2007
10:29 AM

B E F O R E:
HON. ROBERT D. DRAIN
U.S. BANKRUPTCY JUDGE

1 Credit Reporting Act those being -- to provide a summary of his
2 report to the object of the adverse employee action.

3 THE COURT: Okay. All right.

4 MR. HOGAN: Judge, other than if you have any
5 questions on the 1681, I don't have anything further.

6 THE COURT: Well, I mean, I think -- are you at least
7 going to tell me what I thought I just said which is that --

8 MR. HOGAN: Real quickly, Judge 1681 is --

9 THE COURT: -- that this provision doesn't change the
10 definition of consumer reporting.

11 MR. HOGAN: It doesn't change, first of all, the
12 provision exception was effective March 31, 2004, after this --
13 very close but after the report. It's an exception and it
14 says, but for this subsection, the communication would be --
15 would be a consumer report. It uses the same term and then it
16 goes through the exceptions.

17 THE COURT: And that consumer report is someone -- is
18 a report issued by a consumer reporting --

19 MR. HOGAN: Consumer reporting agency.

20 THE COURT: -- agency.

21 MR. HOGAN: Okay? Thank you.

22 THE COURT: All right. Okay. I'm going to take a
23 break till 12:30 and then come back.

24 (Recess from 12:17 till 12:30 PM)

25 THE COURT: Please be seated. Okay. We're back on

1 the record in Delphi Corporation and in particular I'm going to
2 give a bench ruling on the debtor's objection to the proof of
3 claim filed by Mr. Joseph Reno. As I general do with fairly
4 lengthy bench decisions, I'll give it because I think it's
5 important for the parties to know the result right away, but I
6 will review the transcript. And I'll review it not only for
7 accuracy but also reserve the right to edit it if what came out
8 of my mouth, remarkably didn't make sense when it did so and to
9 correct it and that will be my final ruling. But I -- I will
10 not change the gist of my ruling.

11 The claim by Mr. Reno sets forth a number of theories
12 of recovery and I should note first that today's hearing, by
13 agreement of the parties, was limited to the merits of those
14 theories with the parties reserving to a subsequent hearing, if
15 necessary, a determination of damages in connection with any
16 claims that I found to be meritorious.

17 The theories all stem from the same common facts,
18 except the last one which is a claim under ERISA for damages
19 resulting from a -- a delayed payment of ERISA benefits. The
20 claimant also makes a claim under COBRA and obviously that
21 claim itself does not derive from the facts that I'm going to
22 go to -- go through in a moment but the debtor's defense does.
23 Essentially, as both parties have stated, those facts pertain
24 to Mr. Reno's termination as an employee of Delphi in March of
25 2004. Mr. Reno contends that that termination was a wrongful

1 discharge and done in retaliation for his view expressed to his
2 supervisor and ultimately to in-house lawyer at Delphi. That
3 Delphi needed to take certain steps to correct a condition in a
4 waste water container and that might exist in another waste
5 water container. And that consequently he has a wrongful
6 discharge claim and/or a claim under Ohio's Whistle Blower
7 statute because he was terminated after the letter informing
8 Delphi of the waste water container issue was received.

9 He also contends that Delphi did not comply with the
10 Fair Credit Reporting Act in the conduct and provision of
11 information in connection with Delphi's investigation of him.
12 This is not only a claim but is also offered as evidence to
13 show the motivation or protectoral basis for Delphi's
14 termination of Mr. Reno.

15 Delphi, on the other hand, contends that Mr. Reno was
16 fired, not because of the environmental information and point
17 of view that he raised with his supervisor, and ultimately with
18 in-house legal staff, but rather because of information that
19 Delphi learned pertaining to Mr. Reno's conduct on the job and
20 in connection with an investigation of that conduct.
21 Consequently, Delphi argues that his termination was not
22 wrongful but proper. And certainly was not retaliatory. It
23 contends that because Mr. Reno was properly terminated for such
24 reasons, it did not have a responsibility, under COBRA, to him.
25 And that it also is not liable for the remaining cause of

1 action, which I have not yet described which is a defamation
2 cause of action.

3 Finally, Delphi contends that the investigation that
4 it commissioned and the provision of -- or the use of that
5 investigation was not covered within the ambit of the Fair
6 Credit Reporting Act and consequently that there was nothing
7 improper in connection with the investigation. And further,
8 that no inference can be drawn from any alleged impropriety
9 under the Fair Credit Reporting Act as to Delphi's motivation
10 in terminating Mr. Reno's employment.

11 As with any or at least most claims of this nature,
12 the parties have very different views as to the underlying
13 facts. They have set forth those facts in a written record
14 before the court, in a joint exhibit binder that includes
15 witness declarations as well as prior testimony of witnesses
16 and letters and e-mails, which I've reviewed. And I think that
17 in light of the difference in the underlying testimony and the
18 nature of the claims here, it's important to delineate the
19 burden of proof, which I think the parties generally agree
20 upon, as the claimant, Mr. Reno, has the ultimate burden of
21 proof here. However his claim, in large measure, comes down to
22 an assertion that the proffered reason for his termination or
23 the reason proffered for his termination by Delphi was and is
24 merely a pretext. And under those circumstances the courts
25 have developed a burden shifting regime which shows or -- or

1 provides that under the proper circumstances in showing a prima
2 facie case of retaliation the claimant may shift the burden to
3 the defendant to articulate a legitimate non-retaliatory reason
4 for its employment decision. Depending upon the nature of
5 the -- the pretextual argument that is responded to the
6 employer meets that burden by showing an alternative reason
7 than the discriminatory one stated by the claimant.

8 In my view, although -- and I'll get to this in a
9 moment, at oral argument claimant may be setting a different
10 process for shifting the burden. Once the employer has come
11 forward with a non-discriminatory reason for firing the
12 claimant -- I'm sorry -- firing the claimant, the plaintiff
13 again has or the claimant again has the ultimate burden. The
14 area of potential doubt is whether that burden must be one that
15 shows that it is more likely the case that the claimant was
16 fired for the discriminatory reason or that there must be
17 wholly non-discriminatory reason available and provide a basis
18 for the termination. In the pretext cases, I believe that the
19 burden is on the claimant to show that it is more likely that
20 he or she was terminated for a discriminatory, an improper
21 reason or retaliatory reason, see *Manzer vs. Diamond Shamrock*
22 *Chemicals* 29 F.3d 1078, (6th Cir. 1994). In a title seven
23 context the latter view was adopted by a plurality opinion of
24 the Supreme Court in *Price Waterhouse vs. Hopkins* 490 US 228,
25 (1989), although, again, that wasn't a title seven context not

1 focusing on the pretextual argument that the claimant is making
2 here.

3 In any event, let me proceed through the factual
4 record and address first the wrongful discharge claims, since I
5 believe that the other claims, with the exception of the ERISA
6 claim, all flow from that analysis.

7 First, it should be noted that Mr. Reno asserts
8 claims under both Ohio's Whistle Blower Statute and then
9 second, or alternatively, under Ohio Common Law, that his
10 termination violated Ohio Public Policy for raising a
11 legitimate workplace concern regulated by federal and state
12 environmental laws dealing with hazardous wastes.

13 The Ohio Whistle Blower Statute should be addressed
14 first. Because at least based on my reading of it, as well as
15 the cases interpreting it, it contains procedural requirements
16 that obviously do not exist under the Ohio Common Law wrongful
17 termination cases. And I find that Mr. Reno did not comply
18 with those procedural requirements. And under the case law
19 interpreting RC 40113.52(a) 1, he would therefore not have a
20 claim under the Whistle Blower Statute. That statute requires
21 that an employee orally notify his or her supervisor, or other
22 responsible officer of the employer, of the alleged violation.
23 And (b) subsequently file with that person a written report
24 that provides sufficient detail to identify and describe the
25 violation. And then it provides for a mechanism if those

1 requirements have been satisfied, for the employer to correct
2 the violation or make a reasonable and good faith effort to
3 correct it within twenty-four hours after the oral notification
4 or the receipt of the written report, which ever is earlier.
5 And then an opportunity for the employee to seek appropriate
6 redress.

7 The debtors contend that Mr. Reno did not comply with
8 this provision in two respects. One I don't accept, although
9 it's somewhat of a close call. But I believe he did provide in
10 sufficient detail the environmental concerns or hazardous
11 substance concerns that he claims, legitimately, existed with
12 respect to the container tanks. However, procedurally, he had
13 not provided oral notification of those conditions to the
14 person that he sent the written report to. That is, he
15 informed Mr. Gooding, his supervisor, orally of the conditions
16 and subsequently mailed his letter to Mr. Wally, the in-house
17 counsel at Delphi.

18 Given the timing constraints and specific language of
19 this statute, that means that he's not complied and we don't
20 have a cause of action under it, see Heney vs. Chrysler
21 Corporation, 699 NE 2.d 121 at 122, Ohio Court of Appeals
22 (1997).

23 There are other potential defenses to this cause of
24 action but I believe that they are best dealt with in the
25 context of the other wrongful discharge claim raised by Mr.

1 Reno, which is that he was suspended or terminated contrary to
2 Ohio Public Policy. That policy is a doctrine adopted by the
3 Ohio Supreme Court in Greeley vs. Miami Valley Maintenance
4 Contractors, Inc., 551 NE 2.d 981, Ohio (1989). It's an
5 exception to Ohio's general at will employment standard which
6 permits an employer to terminate an employee at will for any
7 cause at any time whatsoever.

8 In order to support a claim for discharge in
9 violation of Public Policy, the plaintiff must show (1) the
10 existence of a clear public policy that has the clarity
11 element. (2) Dismissal under the circumstances would
12 jeopardize that policy, the jeopardy element. (3) Dismissal
13 related to public policy, the causation element and (4) lack of
14 overriding business justification for the employer's action.
15 The debtors do not dispute the clarity or jeopardy elements
16 laid out in the Ohio cases including Painter vs. Grailly, 639 NE
17 2.d 51, Ohio (1994) and Urban vs. Osborne Manufacturing, Inc,
18 847 NE 2.d 1272, Ohio Court of Appeals (2006). They do,
19 however, dispute causation arguing strenuously that Mr. Reno
20 was not dismissed contrary to the -- or because of his
21 championing the public policy of the State of Ohio and United
22 States to have an environmentally clean and safe workplace but
23 for a wholly separate reason.

24 They also contend, relatingly -- relatedly -- excuse
25 me, that the overriding business justification for his

1 termination was, again, because of his personal conduct in
2 violation of Delphi policies as opposed to his disagreement
3 with Mr. Gooding over the proper maintenance and protection of
4 the container tanks and the surrounding environment or his
5 making that concern known to Mr. Wally in his written letter.

6 I've been through the factual record and as is often
7 the case with claims of this kind, there is no smoking gun and
8 the claimant relies upon the Court drawing inferences from
9 circumstantial evidence. On its face that circumstantial
10 evidence, to my mind, does set forth a prima facie case in that
11 on the very day that Mr. Reno had his dispute with Mr. Gooding
12 about the container tanks he was put on administrative
13 suspension, albeit with full pay and benefits.

14 Moreover, he was terminated just short of a month
15 thereafter. After he had notified Mr. Wally on, I believe it
16 was May 4th -- May 2nd, but I may be wrong. Let me check.
17 Yes, May 2, 2004, of his concern about the container as well as
18 his concern about being put on suspension. Between the 20th,
19 when he was suspended, and the date of his termination that
20 letter on its face is a -- one of only two significant factual
21 developments. The other is some additional investigatory work
22 done by the third party investigator, Mr. Brown, that the
23 debtors had hired to investigate a situation that I will talk
24 about in a moment. But those facts alone, in my mind, raise
25 enough of a concern to shift the burden to Delphi.

1 I find, however, based on my review of the factual
2 record including, not only the declarations of Ms. Patrick and
3 Mr. Brown but also the depositions and prior testimony and
4 witness statements, that Delphi has met its burden to show that
5 it was not motivated by the hazardous waste or environmental
6 issues that Mr. Reno had raised with his supervisor and then
7 disclosed to Mr. Wally. And having shifted the burden back to
8 Mr. Reno, I do not believe that Mr. Reno has overcome the
9 evidence that supports my conclusion that Delphi terminated him
10 for separate reasons that were legitimate and unrelated to
11 retaliation because of Mr. Reno's views as to the container
12 tanks.

13 Specifically, it became known to Delphi that a
14 dumpster of one of its contractors had been placed on the Troy
15 property, or the Troy site, containing garbage and debris that
16 was not Delphi's. In and of itself that was a fairly innocuous
17 event, however, it was of enough concern, apparently, to cause
18 Mr. Reno's boss, Mr. Gooding, to arrange for a third party
19 investigator, Mr. Brown, to determine the circumstances under
20 which the dumpster came to the site. The reason for that
21 concern appears to be that it was very quickly assumed and
22 assumed correctly, that the debris in the dumpster originated
23 with Mr. Reno. Delphi has a clear policy against conflicts of
24 interest and separately and distinctly soliciting gifts or
25 favors from suppliers or vendors or customers. And there was

1 an appearance that may have occurred here. All of this
2 occurred well before the date that Mr. Reno says he first
3 learned of the waste water treatment container issue, which he
4 says was February 13, 2004.

5 The investigation started two weeks before then. And
6 the investigator interviewed Mr. Reno on February 16th, as well
7 as other parties involved. As a result of that investigation
8 process Mr. Brown concluded that Mr. Reno had obtained a favor
9 from Troy Calton, an employee of the company called Onyx that
10 works directly for, as a contractor, Mr. Reno to remove
11 material from his yard and/or house. He also learned that this
12 arrangement may well have been a secret one. And that it was,
13 at least, not cleared in advance with Mr. Reno's superiors.
14 And perhaps as important, that in the process of his
15 investigation Mr. Reno was not forthcoming as to the facts of
16 the relationship and had sought out from his subordinates
17 witness statements in connection with the relationship, that he
18 held in reserve. All of this led Mr. Brown and also Delphi's
19 personnel officers to conclude that Mr. Reno had both violated
20 the favor policy and the conflict of interest policy, as well
21 as potentially put undue pressure on subordinates and perhaps
22 asked them to remember facts that they could not remember or
23 that were not, in fact, the truth.

24 The record, I should be clear, is not one where I can
25 ultimately decide whether Mr. Brown's conclusions were right or

1 not. And beyond that the claimant contends that they were so
2 clearly incorrect that Delphi could not credibly be said to
3 have relied on them as a basis for termination, which is a
4 proper inquiry for me to make.

5 I'll note in considering the conclusions that Mr.
6 Brown made, that I do credit his conclusions with regard to the
7 underlying arrangements between Calton and Mr. Reno. Mr.
8 Calton changed his story in a second interview with Mr. Brown;
9 in a way that I believe indicated that the second version is
10 the correct version. It is, moreover, one that his -- Mr.
11 Calton's subsequent deposition in key respects corroborates.
12 Namely that the dumpster was filled and taken under an
13 arrangement with Mr. Reno -- with Mr. Reno's knowledge and, in
14 fact, at least under Calton's belief, the implied assumption
15 that ultimately this would be run through Delphi's accounting
16 system. To my mind, having reviewed Delphi's Foundation of
17 Excellence Policy, at Exhibit 17, whether ultimately Mr. Reno
18 felt he was going to pay for this process or not, in full, is
19 less important than the fact that he engaged in it at all with
20 Mr. Calton without disclosing it to his supervisors.

21 I also believe that the issue about Mr. Reno not
22 being forthcoming about the facts of this relationship is
23 fairly well established through Mr. Brown's investigation. And
24 that, in turn, lays some doubt on the witness statements that
25 he got out of his subordinates. Particularly in light of the

1 fact that one of them did not provide a witness statement
2 although asked to do so. That individual apparently no longer
3 working for Delphi and Mr. Calton's testimony that neither of
4 the individuals who did provide statements were present when he
5 had the discussion with Mr. Reno about the dumpster.

6 Ms. Patrick states in her affidavit, and I believe
7 that the record has to corroborate this, that Mr. Reno was put
8 on suspension before she, or anyone making that decision,
9 understood his contention about the container tanks. And that
10 it was a coincidence that Gooding gave him this news on the
11 very day that they had that argument.

12 That leaves, therefore, the analysis to the
13 subsequent period. And I think that this is where Mr. Reno and
14 his counsel properly turned their attention. Their argument is
15 that, in essence, the work that Brown did and the -- and that
16 led Delphi to suspend Mr. Reno was not sufficient to lead to
17 his termination and could not be viewed to be sufficient to
18 lead to his termination. But rather that it was the subsequent
19 development of his letter to Mr. Wally and his insistence of a
20 different approach to the container tank problem than Mr.
21 Gooding wanted to take that led to the termination.

22 There is no direct evidence of this in the record.
23 The claimant relies, therefore, on two things. First, his
24 contention that the dumpster incident, as the parties have
25 referred to it, is simply too insignificant to lead to his

1 termination. And I should note that he has spent his carrier
2 at Delphi.

3 The second is that Mr. Brown's investigation, by Mr.
4 Brown's own admission, was not complete at the time that Mr.
5 Reno was terminated in -- in March of 2004. Why not wait, he
6 contends, until the investigation was complete -- for the
7 record to be done before making that decision and in answering
8 that question he says, because it was simply a facade or a
9 pretense -- or a pretext for a decision.

10 I've carefully considered those two points and I'll
11 deal with them in order. It seems to me that it is regrettable
12 that an individual would be fired over something as foolish and
13 petty as this dumpster incident. However, Mr. Reno is a person
14 charged with important duties that involve credibility and
15 adherence to proper procedures. And I understand why Delphi
16 could legitimately conclude that not only the relationship with
17 the contractor but also the way that it appears the -- Mr. Reno
18 reacted to the investigation in terms of arguably not telling
19 the truth and arguably inducing subordinates to take positions
20 on his behalf, arguably improperly, all go to important issues
21 as to his reliability and Delphi's policies.

22 I have the impression, which I believe is
23 corroborated to some extent by some updating of the initial
24 investigation by Mr. Brown, that Delphi was concerned that this
25 was not an isolated matter but that Mr. Reno had involved other

1 people, both employees and contractors, in doing favors for
2 him. For example, the statement by Mr. Ruble that he helped
3 with an aquarium business of his wife even though Mr. Ruble
4 testified that he did that work for Mr. Reno and his wife after
5 hours.

6 So, it does not appear to me that the dumpster
7 incident is, in fact, comparable to Captain Queeg's Ice Cream
8 and Strawberry incident in the Cayne Mutiny but that had
9 substance to it, particularly given Mr. Reno's position.

10 As far as the issue of what I should take away from
11 Mr. Brown's acknowledgement that his investigation was
12 incomplete, I have also considered that point and I believe
13 that in the absence of anything in the record to show how much
14 more Mr. Brown felt he needed to make it complete, and in what
15 sense he felt it was incomplete, I turn to the e-mail from him
16 to Delphi on the day that Mr. Reno was suspended. In which he
17 said that it should be clear to everyone that Joe has violated
18 several rules, Joe meaning Mr. Reno. He said that, in the same
19 paragraph -- in the same section he acknowledged he would like
20 to do more work. I don't believe that, based on this record,
21 the fact that Mr. Brown believed the investigation was
22 incomplete is something that in and of itself shows that Delphi
23 was using his work as a pretext, given what had already been
24 disclosed.

25 Mr. Reno contends that I should look askance on his

1 investigation also because it was incompetent and illegal. And
2 I've considered that argument as well. As far as the in
3 competency point, I'll note that he has been an investigator
4 for six years and I do not see, in his investigation or in the
5 subsequent testimony or record, any attempt to do anything
6 other than a -- a good job. He does not appear to me to be
7 negligent or alternatively motivated to reach a certain result.
8 And I do not believe that the law requires him to conduct an
9 investigation beyond what he did.

10 As far as the illegal contention, that dovetails back
11 to Mr. Reno's claim that the investigation and the debtor's
12 failure to provide a copy of it to Mr. Reno violated the Fair
13 Credit Reporting Act. There may be instances where the failure
14 to comply with a law, such as the Fair Credit Reporting Act,
15 may lead a Court to draw an inference that something very
16 serious was motivating the debtor to act contrary to law. And
17 usually that something very serious may be an ulterior purpose.
18 For example, here it is argued, at least between the lines,
19 that why would the debtor violate the FCRA but for the fact
20 that he wanted to cover up that it was doing it -- doing the
21 whole exercise as a facade to hide a retaliatory purpose. I,
22 however, do not accept that argument here. I will determine,
23 later in this ruling, whether the FCRA was violated or not.
24 But I think, at a minimum, it is clear that it was not clearly
25 violated. That is that someone in Ms. Patrick's position or

1 Mr. Gooding's position, or other people involved in this
2 process, would not have known, with any degree of clarity that
3 what they were doing was in violation of the FCRA which
4 undercuts the whole motivational or inferential argument about
5 motivation.

6 The argument as to whether the FCRA applies here is a
7 plain meaning argument that has been criticized by a number of
8 courts, particularly in respect of the version of the statute
9 that would be applicable here, which is that in addition to
10 applying to the provision of reports with regard to a
11 consumer's credit worthiness, credit standing and credit
12 capacity, the statute provides that it applies to such reports
13 going to a consumer's character, general reputation, personal
14 characteristics of mode of living with regard to employment
15 purposes.

16 I agree with Johnson vs. Federal Express Corporation,
17 147 F.2d, 1268 MD Alabama (2001), Heartland vs. Lyle Park
18 District, Northern District of Illinois (2001) and Rug vs.
19 Henack, Inc., 2002 U.S. District Lexus 18101 SDNY (2002). As
20 to their skepticism that the FCRA applies to this type of
21 investigatory report dealing with a consumer's particular
22 workplace conduct that is in contrast to reports going to
23 decisions to hire or to fire based on general non-workplace
24 conduct, such as set forth in Comeaux, C-O-M-E-A-U-X, vs. Brown
25 and Williamson Tobacco Company, 915 F.2d, 1264 9th Cir. (1990)

1 and Hodge vs. Texaco, Inc., 975 F.2d 1093, 5th Cir. (1992).

2 In addition, I believe that the record, as it is,
3 does not enable me to find that Mr. Brown's company, which is
4 not described other than simply being a large investigatory
5 company, would be a credit reporting agency which is necessary
6 to fit within the FCRA's definitions of consumer report -- an
7 investigative consumer report which trigger the applicability
8 of the statute under 15 U.S.C. 1681 AF, which is defined as any
9 person which for monetary fees, dues or on a cooperative non-
10 profit basis, regularly engages in whole or in part in the
11 practice of assembling or evaluating consumer credit
12 information or other information on consumers for the purpose
13 of furnishing consumer reports to third parties and which uses
14 any means or facility of interstate commerce for the purpose of
15 preparing or furnishing consumer reports, see again Rug vs.
16 Henack, Inc., 2002 U.S. District Lexus 18101.

17 So, both on the merits, but as importantly since, as
18 was pointed out in oral argument, even if Mr. Reno were to
19 prevail on the merits of the FCRA claim he would get a very
20 small amount of money. Therefore, not only on the merits, but
21 also in connection with evaluating whether Delphi was engaging
22 in a pretext when it said that it relied upon Mr. Brown's
23 investigation. I conclude that the FCRA has no -- no bearing.

24 Therefore, in considering the circumstantial evidence
25 in the record before me where Delphi has come forward with a

1 non-retaliatory or a non-discriminatory reason for firing Mr.
2 Reno that I find credible, I do not believe that MR. Reno has
3 carried his burden of proof to show that that was not the
4 reason for his termination, but that to the contrary, it was
5 more likely that he was terminated in retaliation or for having
6 taken his views as to the container tank issue over Mr.
7 Gooding's head.

8 I'll note further, although ultimately this is a
9 lesser reason for my holding that Delphi in response to Mr.
10 Reno's letter apparently or at least shortly after the letter
11 was received, commissioned a third-party environmental
12 consultant to look at the tanks and that was done on March 6th.
13 And that consultant's report appears in the record at Exhibit
14 19. So there does appear to be a prompt response by Delphi,
15 certainly no attempt to keep Mr. Reno's complaint under wraps
16 but to the contrary, to open it up to a third party. And I
17 think the report not only has to speak for itself, because
18 there's been no further testimony about its bona fides, but I
19 think does speak for itself as a legitimate third party
20 corroboration of Delphi's actions. It further, later that
21 summer in May, apparently involved the local authorities in
22 looking at the -- at the tanks, who also were satisfied.

23 So while I acknowledge that -- that sunshine aspect
24 of what Delphi did doesn't necessarily obviate Mr. Reno's
25 claim, because after all one could still infer if the

1 circumstantial evidence was sufficient that Delphi terminated
2 him anyway, because they were mad that he raised it in the
3 first place, it does further support Delphi's contention that
4 as far as that aspect of his performance was concerned, as
5 opposed to his dealing with Mr. Calton and subordinates, they
6 considered his advice and took it seriously.

7 The defamation claim, I believe, is based on those
8 findings, one that will not lie under Ohio law. The stated
9 claim, under Ohio law, for defamation the plaintiff must show
10 that there was a false statement defamatory to the plaintiff
11 publish to a third party by a defendant who was, at least,
12 negligent and damaging to the plaintiff's reputation. A
13 plaintiff must prove a defendant's negligence by clear and
14 convincing evidence, but need only prove the other elements by
15 a preponderance of the evidence. In a defamation action,
16 however, falsity is an essential element. Furthermore, in
17 defending against a defamation action it is sufficient for the
18 defendant to show that the imputation is substantially true or
19 as it is often put, to justify the gist, the sting or the
20 substantial truth of the defamation, see Perry vs. Mohawk
21 Motors of Michigan, 236 F.3d 299 at 312 6th Cir. (2001),
22 citations omitted. Here the defamation was the statement
23 that -- or the alleged defamation was the statement that Mr.
24 Reno was being terminated because of the dumpster incident and
25 related investigation thereof. And for the reasons I've

1 stated, there was, under the Ohio law, consequently no basis
2 for a defamation claim based on that statement.

3 The COBRA claim is, for me, somewhat more difficult
4 to decide, given the nature of this wrongful action. The
5 statute provides, in 29 U.S.C., Section 16 -- I'm sorry,
6 1163(2) that continuing coverage is not required to be provided
7 to an employee after termination for a "gross misconduct".
8 That term's not defined. The courts have grappled with that
9 definition in various ways. One, at least, has said that gross
10 misconduct constitutes a deviation from the employer's business
11 ethics policy for, among other reasons, failing to disclose a
12 financial interest in a supplier, accepting favors and gifts
13 from a vendor and claiming reimbursement from the company for
14 non-official travel, see Karby vs. Standard Products Company,
15 1992 West Law 333931, District Court, South Carolina (1992). A
16 case out of Texas has defined the term to mean a substantial
17 deviation from the high standards and obligations of a
18 managerial employee. That would indicate that such an employee
19 cannot be entrusted with his management duties without danger
20 to the employer, Aveena vs. Texas Pink Stands, Inc., 1991 U.S.
21 District Lexus 13957, Western District Texas (1991).

22 As I said, I have not determined here, because I
23 cannot, on this record whether Mr. Brown was right or not. I
24 have determined that there was enough basis in his
25 investigation for a proper termination of Mr. Reno. But I do

1 not know from his investigation whether he has established
2 gross misconduct. And I don't believe the debtors have here
3 either, as a matter of fact, for purposes of this statute.
4 They have, again, established that they had a valid basis for
5 terminating Mr. Reno, based on the investigation. But I think
6 that proving gross misconduct, as opposed to proving that they
7 had enough basis to terminate him, requires a -- more in the
8 factual record. So I believe that they have not established
9 what I think is their burden here, to show an established gross
10 misconduct. So I believe that his claim is established on
11 COBRA.

12 Finally, as to the ERISA claim, I think it was made
13 clear at oral argument, that claim really does devolve into a
14 damages issue. I did not see any opposition on the merits as
15 to, for example, an alleged defense that it was proper to delay
16 distribution of Mr. Reno's pension money. And so the issue as
17 to whether that distribution included an element of interest
18 and/or if it didn't, what the proper damages would be for not
19 having received it from the date, which has also not been
20 established, that the pension money should have been
21 distributed and the date it was, which has been established,
22 should all await further trial if the parties choose to do so.
23 Although my hope is, given the amount claimed, that there can
24 be a resolution of that matter.

25 All right. As I said, I'm going to go over the

1 transcript; because obviously this has gone on, probably far
2 too long for all of you, and I want to make sure it's accurate
3 and properly reflects my thinking on this issue. But again,
4 the conclusions won't change. So, Mr. Hogan, you should submit
5 an order consistent with my ruling which disallows all of the
6 claims except for the COBRA and ERISA claims. Reserves the
7 ERISA issue for further trial on damages calculation and allows
8 the COBRA claim.

9 MR. HOGAN: We'll do so, Judge.

10 THE COURT: Okay. Thank you. Oh, you don't have to
11 settle the order but I -- I -- you'll circuit -- I'm sure but
12 I'll say it anyway, you'll provide it to counsel for Mr. Reno
13 so that he can make sure that it says what I just said.

14 MR. HOGAN: We will, Judge.

15 THE COURT: Okay. Thank you.

16 (Proceedings concluded at 1:58 PM)

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I N D E X

RULINGS

	Page	Line
Denial of all claims	72	25
except for COBRA and		
ERISA		

C E R T I F I C A T I O N

I, Pnina Eilberg, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

_____, March 27, 2007

Signature of Transcriber

Date

Pnina Eilberg

typed or printed name